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Mr. Ayer  
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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-197469

DATE: February 5, 1980

MATTER OF: Needles, Forest Products

3840

DIGEST:

Forest Service may reform contract to show: (1) actual volume of merchantable timber; and (2) corresponding lump-sum payment, where purchaser reasonably interpreted nonstandard provision as material representation regarding quantity of merchantable timber and Forest Service failed to notify purchaser that validity of representation had been questioned.

AGC 0007

The Department of Agriculture, United States Forest Service (Forest Service), requests our opinion on the propriety of reforming Needles Forest Products' (purchaser) lump-sum timber sale contract to reflect the actual volume of merchantable timber on the Hayden Creek Timber Sale (Sale). The Forest Service believes it negligently misrepresented a material fact when it substantially overstated the volume of merchantable timber on the Sale. For the reasons set out below, we agree with the Forest Service that, in this case, reformation of the purchaser's contract is appropriate.

The lump-sum sale was issued on a Forest Service standard form contract (2400-3 Timber Sale Contract). Under the terms of the contract the purchaser agreed "to purchase, cut and remove all included timber." The contract described the "included timber" as consisting of "decks of logs \* \* \* containing trees (logs) marked with blue paint located along the clearing for the Bayfield-Pagosa powerline project." - 10 The contract provided a space for an estimate of the volume of the included timber. The estimate was 380 MBF (thousand board feet). In most respects the contract paralleled the standard lump-sum sale format; however, standard provision 4 (Volume Determination) was deleted and the following inserted in its stead:

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"19. The purchaser and the Forest Service agree that the merchantable timber to be cut, \* \* \* is 380 MBF of live and dead Ponderosa pine \* \* \* and that the total payment for such timber is Nineteen thousand three hundred eighty dollars (\$19,380.00) for stumpage \* \* \*."

The Forest Service reports that during the advertisement of the Sale a prospective purchaser advised the Forest Service that "there was less than 200 MBF in the decks." The Forest Service questioned the District regarding this advice and was assured by the District that the volume was 380 MBF. There is no indication in the record that the Forest Service ever informed the purchaser that there had been a question regarding the accuracy of the 380 MBF figure.

On April 28, 1977, the Sale was awarded to the purchaser. On July 29, 1977, the purchaser informed the Forest Service that the Sale did not contain the advertised volume and that the purchaser would not make any further payments on the outstanding balance of \$9,518.20.

During August 1978 the Forest Service conducted a stump cruise of the Sale. The cruisers walked the powerline numbering, measuring, and counting the stump butts marked with blue paint. The cruisers then measured numerous standing trees for height. Heights were then assigned to stumps with diameters equal to the diameters of the respective standing trees. These figures were applied to a local volume table. The Forest Service extrapolated an actual volume of 157 MBF in the decks offered for sale. Approximately 37.34 MBF remained in the decks at the time of the purchaser's abandonment of the sale. However, since the purchaser admitted to removing 152.33 MBF prior to abandonment, the Forest Service added the amount hauled (152.33 MBF) to the amount decked (37.34 MBF) and concluded that the actual volume of included merchantable timber was 189.67 MBF. This corresponded to a lump-sum payment of \$9,673.17 instead of \$19,380. Thus, when allowance is made for purchaser payments received prior to abandonment and proceeds which

have accrued to the Forest Service from third-party purchasers of the remaining decked timber, the net effect of reformation is a \$211.13 refund to the purchaser.

Normally, volume estimates of merchantable timber are not regarded as material aspects of timber sale contracts since the material aspect is the "included timber," however that term happens to be defined, and not the "merchantable timber." See, Willamette Industries, Inc., B-188548, November 8, 1979, 79-2 CPD 338. Anthony G. Bamonte, AGBCA No. 77-154, October 24, 1978, 78-2 BCA ¶ 13,508. There are, however, exceptions to this rule where the particular circumstances of the case lend the estimate of merchantable timber a materiality it would not otherwise enjoy. See, Everett Plywood and Door Corporation v. United States 419 F.2d 425 (Ct. Cl. 1969); L. Z. Hiser, B-188785, May 23, 1977, 77-1 CPD 357; Douglas Studs, Inc., B-195049, July 9, 1979, 79-2 CPD 20. We believe that this is such a case.

Two aspects of the Sale, taken together, cause us to believe that the 380 MBF estimate of merchantable timber was a material representation: (1) provision 19 of the contract stated the mutual understanding of the Forest Service and the purchaser that "the merchantable timber \* \* \* is 380 MBF"; and (2) there is nothing on record indicating that the Forest Service informed the purchaser that the 380 MBF figure had been questioned by a third party. The Forest Service's use of the nonstandard provision 19 is in our opinion irreconcilable with the standard provision that the 380 MBF figure is merely an estimate of the amount of merchantable timber that might be extracted from the "included timber" offered for sale.

In view of the mutual agreement that 380 MBF was in fact contained within the Sale, we believe that it was reasonable for the purchaser to contract on that basis. We have held that such an ambiguity in a timber sale contract is to be construed against the Forest Service drafter of the document and in favor of the purchaser, if the purchaser's interpretation is reasonable. B-173644, August 5, 1971.

Accordingly, the contract may be reformed to show: (1) the actual 189.67 MBF volume of merchantable timber; and (2) the corresponding lump-sum payment of \$9,673.17, with a \$211.13 refund to the purchaser.

A handwritten signature in cursive script, reading "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

For The Comptroller General  
of the United States